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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-94
Scripps Howard Broadcasting Company)	FCC File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV, Baltimore, Maryland)	
and)	
Four Jacks Broadcasting, Inc.)	FCC File No. BPCT-910903KE
For a Construction Permit)	
For a New Television Facility on Channel 2 in Baltimore, Maryland)	

TO: The Honorable Richard L. Sippel
Presiding Administrative Law Judge

**REPLY TO OPPOSITION TO THRESHOLD SHOWING OF
SCRIPPS HOWARD BROADCASTING COMPANY'S UNUSUALLY GOOD PAST
PROGRAMMING RECORD**

Scripps Howard Broadcasting Company ("Scripps Howard"), licensee of Station WMAR-TV and an applicant for renewal of license in the above-referenced proceeding, through counsel, hereby offers its reply to the Opposition to Threshold Showing of Scripps Howard Broadcasting Company's Unusually Good Past Programming Record ("Opposition") filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on May 26, 1993. Four Jacks' Opposition urges that Scripps Howard's threshold showing should not be considered principally (1) because this is a comparative renewal proceeding; (2) because Scripps Howard's threshold showing involves, inter alia, the performance of its stations in six markets other than Baltimore;

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and (3) because, Four Jacks alleges, consideration of the issue requires either a showing of integration of ownership and management or a lengthy association between the applicant's principals and the particular community of license to be served in this proceeding. Each of these arguments--as well as Four Jacks' effort at an attack on Scripps Howard's threshold showing itself--is plainly wrong.

A "past broadcast record" issue may be sought
by a renewal applicant.

Four Jacks' "foremost" argument against the addition of the requested "past broadcast record" issue is that "this is a comparative renewal proceeding." Opposition at 2. This fact, while true, is irrelevant. As Four Jacks notes, Scripps Howard has pointed to no cases where an incumbent seeking license renewal has received "past broadcast record" issue credit, id., but there are likewise no cases where such a request by a renewal applicant has ever been denied. Absent some affirmative basis for excluding the issue, the issues identified in the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, reconsideration denied, 1 F.C.C.2d 918 (1965) ("1965 Policy Statement"), including past broadcast record, apply in the comparative renewal context. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants (Second Further Notice of Inquiry and Notice of Proposed Rulemaking), 3 F.C.C. Rcd 5179, 5185 (1988) (describing the applicability of "past broadcast record" issues in comparative renewal proceedings).

Four Jacks' reliance on the discussion of the distinction between "renewal expectancy" and "past broadcast record" issues in Knoxville Broadcasting Corp., 103 F.C.C.2d 669 (Rev. Bd. 1986), see Opposition at 3-4, is misplaced. This discussion is not instructive at all on the issue of whether a renewal applicant may seek a "past broadcast record" issue because the entity seeking "past broadcast record" credit in that case was not an applicant for license renewal. See id. at 700. Likewise, in the other cases cited by Four Jacks, see Opposition at 4-5, the issue of whether an applicant could seek "renewal expectancy" and "past broadcast record" credit simply was not before the decision-maker. Thus, Four Jacks' claim that seeking "past broadcast record" credit and a renewal expectancy "is contrary to well established case precedent," Opposition at 5, is wholly unsupported by any case cited in its pleading.

On the other hand, it would be directly contrary to reasoned decisionmaking to exclude consideration of the unusually good (or poor) past broadcast record of an incumbent licensee seeking renewal. Such evidence has been determined to be predictive of licensee performance and to be a relevant concern in comparative hearings. See 1965 Policy Statement at 398. The only valid argument for excluding the issue would be if, as Four Jacks does suggest, Opposition at 4, the "past broadcast record" issue were wholly subsumed by the "renewal expectancy" issue and thus (in the case of an unusually good record) would necessarily lead solely to a double credit for the incumbent.

Four Jacks, however, is simply wrong in asserting that "a renewal expectancy equates to past broadcast record," Opposition at 4. Consideration of a "past broadcast record" issue, where the necessary showing can be made, instead offers the Commission separate predictive evidence about the renewal applicant's likely future performance. It is obviously a separate issue with respect to the renewal applicant's performance at stations in other markets, see discussion infra at 5-6. To the extent that there might be any potential overlap in the credit awarded for an unusually good "past broadcast record" at the station in the community of license where renewal expectancy would apply, the avoidance of any double credit would properly be accomplished by lessening the weight afforded that part of the "past broadcast record" showing, not by totally excluding the introduction of other highly relevant information from Commission consideration.¹

In addition, consideration of the practical effects of the exclusionary policy urged by Four Jacks shows that such a policy would lead to plainly improper and unfair results. For example, if "past broadcast record" evidence could not be raised about a renewal applicant:

- a renewal applicant's poor past broadcast record in other communities would be excluded from

¹ The evidence of superior programming performance at Station WMAR-TV, Baltimore, described in Scripps Howard's "past broadcast record" threshold showing is offered not for any double credit with respect to Scripps Howard's renewal expectancy showing, but to show that the Scripps Howard policies of encouraging superior local programming are in fact in evidence at the station whose predicted performance is being evaluated.

consideration unless it rose to the level of basic character qualifications; and

- a renewal applicant which was denied its "renewal expectancy" for any reason would be denied consideration of a superior "past broadcast record" issue even though that applicant would otherwise be considered just like an applicant for a new facility.

Indeed, if it is supposed, for argument's sake, that Four Jacks' principals had been able to make any showing of an unusually good past broadcast record at their stations, adoption of Four Jacks' position would then have provided them with the ability to support their case with that showing while Scripps Howard would be denied any opportunity to offer balancing evidence of superior past performance at its stations.

A "past broadcast record" showing achieved at stations outside the community of license involved in the proceeding is appropriate so long as the applicant shows that the achievement of that record is relevant to the predicted performance of the station at issue in the proceeding.

Four Jacks offers no support for its assertion that an applicant's showing on a "past broadcast record" issue may not rely on its superior performance in communities other than the one to be served in its pending proposal. See Opposition at 2 & 5. In fact, the 1965 Policy Statement makes no reference to the location of the owned station at which the unusually good performance record was established. See 1 F.C.C.2d at 398. What is crucial instead is whether "the particular reasons, if any, which may have accounted for that record . . . will be present in the proposed operation." Id.

It is only this criterion, plus the quality of the threshold showing itself, that the Commission has considered in assessing whether to add the issue. See, e.g., Omaha TV 15, Inc., 4. F.C.C. Rcd 730, 735 (1988) (rejecting a showing offered for St. Louis and Sacramento stations in an Omaha, Nebraska proceeding, based solely on the inadequacy of the showing of an unusually good record at the distant stations and a failure to show any basis for considering these stations' records in predicting the operations of the proposed Omaha station): F.R.M. Rev. Inc., 7 F.C.C. Rcd

assertion, the Review Board did not suggest that the separation of integration credit from its "past broadcast record" finding was in

accordance with the Commission's findings. With the Review Board in

[the majority owner] is, as a comparative matter, merely tangential to the more comprehensive prognosis of WTVK's prospective performance, based on that particular station's "past broadcast record", a severable matter we address below in due course.

Id. at 686 (citation omitted) (emphasis added).

In light of these express findings and conclusions, Four Jacks' pleading is wrong in stating that the Board "characterized as moot" the issue of "past broadcast record" credit for a non-integrated applicant. The Review Board in fact stated only that the point that others besides the majority owner contributed to the station's past record "becomes somewhat moot" in light of the majority owner's continuing role at the station. Id. at 684. This statement, when read in context, obviously does not hold that the Review Board's separation of integration credit from "past broadcast record" credit is "moot" in any way. It is apparent instead from the extent and content of the Review Board's analysis that it was taking pains to explain that its finding on the "past broadcast record" issue was not dependent on its separate holding that the denial of integration credit was reversible error. See id. at 684-85.

Finally, the Commission itself has interpreted the 1965 Policy Statement to state that "the term 'past broadcast record' refers to experience of an applicant's principal (whether or not the principal would be integrated into management) consisting of significant participation in operation of a broadcast station in which he or she held ownership." See Omaha TV 15, Inc., 4 F.C.C. Rcd at 735 (emphasis added). These cases thus demonstrate

conclusively that proposed integration is not an essential element to consideration of the "past broadcast record" issue.

Four Jacks also suggests that "a long and important association of the applicant's principals with the community of license" is the only possible substitute for integration. See Opposition at 2 and 6. Since integration itself is not required, such an association also is obviously not required as a precondition to obtaining the issue. The discussion herein with respect to the ascertainability of "past broadcast record" shows

Threshold Showing of Unusually Good Past Programming Record, at Programming Exhibit B.

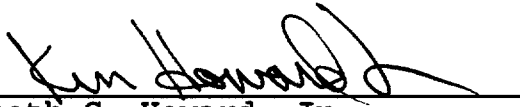
CONCLUSION

Scripps Howard's "past broadcast record" programming showing is unusual, but so is this case. Scripps Howard's threshold showing has demonstrated comparative evidence of superior local non-entertainment programming performance at Scripps Howard's network stations, coupled with a showing of the reasons that this type of superior performance may likewise be expected from Station WMAR-TV. This information is highly relevant to predicting Station WMAR-TV's likely programming performance in the future.

WHEREFORE, for the reasons stated herein, Scripps Howard requests that it be permitted to offer evidence of its unusually good program service under the "past broadcast record" issue.

Respectfully submitted,

SCRIPPS HOWARD BROADCASTING
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Certificate of Service


I, Ruth E. Omonijo, a secretary in the law offices of Baker & Hostetler, here certify that I have caused copies of the foregoing "Reply to Opposition to Threshold Showing of Scripps Howard Broadcasting Company's Unusually Good Past Programming Record" to be sent via First Class United States Mail this 8th day of June, 1993, to the following:

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